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Eighteen Feet of Clay: Thoughts on Phantom Rule 4(m)

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THE STORY

The Supreme Court recently transmitted to Congress a number of amendments to the Federal Rules of Civil Procedure.[1] Unless Congress acts to reject, change, or delay them, the amendments become law on December 1 of this year.[2] They represent some but not all of the changes proposed earlier to the Court by the Judicial Conference.[3] Perhaps the most ambitious change the Court decided to transmit concerns Rule 15(c).

Rule 15 describes circumstances in which parties may revise (amend) pleadings. In situations falling within paragraph (c) of the rule, an amendment inserting a new claim "relates back to the date of the original pleading." Paragraph (c) affects cases where statutes of limitation eliminate the option of presenting the same claim in a separate suit. Rule 15(c) requires for its application a significant connection between the claim relating

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1. Amendments to the Federal Rules of Civil Procedure, 111 S. Ct. (No. 16) CCXIII (Apr. 30, 1991).

2. Congress may legislate rules of procedure for federal courts directly. *See infra* note 13. But nearly all rules result from the more circuitous process established in the Rules Enabling Act. 28 U.S.C. §§ 2071-2075, 2077 (1988). *See generally* W. BROWN, FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES 5-34 (1981). The Supreme Court's April 30 initiative follows this approach. It came in just under the deadline, since the Court's transmission must come "to the Congress not later than May 1 of the year in which a rule prescribed . . . is to become effective." 28 U.S.C. § 2074. Unless Congress intercedes, the transmitted amendments take effect "no earlier than December 1 of the year in which such rule is so transmitted." *Id.*

3. The Court's transmission included amendments to Federal Rules of Civil Procedure 5, 15, 24, 34, 35, 41, 44, 45, 47, 48, 50, 52, 53, 63, 72, and 77. 111 S. Ct. (No. 16) CCXIII. But the Chief Justice noted in an accompanying letter to the Speaker of the House that "amendments proposed by the Judicial Conference to Rules 4, 4.1, 12, 26, 28, 30, and 71A are not transmitted at the present time pending further consideration by the Court." *Id.* at CCXIV.

back and an original claim.[4] When an amendment changes the party claimed against, Rule 15(c) makes relation back even more difficult.[5]

How difficult became evident in the Supreme Court's decision *Schiavone v. Fortune Magazine*.[6] The Court stated there that an amendment changing a party would relate back only if the new party had notice of the case prior to the running of the statute of limitations. In response to criticism that *Schiavone* had not given enough life to the relation-back principle,[7] the Judicial Conference proposed to the Court, and the Court has now transmitted to Congress, new subparagraph (c)(3). To overcome *Schiavone*,[8] (c)(3) creates for amendments changing parties a relation-back route that is independent of statutes of limitation: when (in the language of the new provision) the substituted party has notice "within the period provided by Rule 4(m) for service of the summons and complaint."[9]

The problem is that this language in (c)(3), if permitted to take effect, will refer to nothing at all. The provision in Rule 4 governing time for service is paragraph (j). Paragraph (j) is also the *last* paragraph in the rule. There is no Rule 4(m). Paragraph (m) existed only in the Judicial Conference's proposed revision to Rule 4, which the Supreme Court declined to recommend to Congress. This appears to be the source of the Court's error.

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4. In the language of the rule, it is necessary that "the claim or defense asserted in the amended pleading" arise "out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." FED. R. CIV. P. 15(c) [hereinafter RULE 15(c)]. *See generally* 3 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 15.15[3] (1991).

5. The rule adds preconditions that:

> within the period provided by law for commencing the action against the party to be brought in by amendment that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

RULE 15(c). On these provisions generally, see 6A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE & PROCEDURE § 1498 (1990); Helzick, Note, *Looking Forward: A Fairer Application of the Relation Back Provisions of Federal Rule of Civil Procedure 15(c)*, 63 N.Y.U. L. REV. 131 (1988).

6. 477 U.S. 21 (1986).

7. Bauer, Schiavone: *An Un*-Fortune-*ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 720 (1988); Brussack, *Outrageous* Fortune: *The Case for Amending Rule 15(c) Again*, 61 S. CAL. L. REV. 671 (1988); Lewis, *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision*, 85 MICH. L. REV. 1507 (1987). Commentators felt that Rule 15(c) should reach cases where notice to the substituted party came after the statute ran but within time for service of process under Rule 4.

8. It "has been revised to change the result in Schiavone v. Fortune . . . with respect to the problem of the misnamed defendant." Proposed Amendments to the Federal Rules of Civil Procedure, Advisory Committee Note, 111 S. Ct. (No. 16) CCLXXIV, CCCXXV (June 19, 1990).

9. 111 S. Ct. (No. 16) at CCXVII.

The Judicial Conference proposed revisions of Rules 4 and 15 simultaneously. Proposed Rule 15(c)(3) thus referred to the place where the Judicial Conference had relocated time-for-service requirements in its proposed revision of Rule 4: paragraph (m). The Court failed to realize that, once it decided to implement the Judicial Conference's revision of Rule 15 without changing Rule 4, it would be necessary to realign the reference in 15(c)(3). The reference thus should have been "within the period provided by *Rule 4(j)*[10] for service of the summons and complaint."[11]

Eventually, litigants will probably receive the greater relation-back opportunities so obviously intended by Rule 15(c)(3).[12] Congress could now salvage matters by redrafting the provision.[13] If by inaction Congress permits the flawed subparagraph to become law,[14] the Supreme Court can expedite review of a case involving it. The Court can then replace the bogus reference to 4(m) with one to 4(j), invoking the interpretative maxim that statutory language—however clear—cannot direct absurd results.[15] Or, since the Justices might find use of the maxim in this setting somewhat mortifying,[16] the Court might address the problem indirectly by sending a corrective amendment to Congress next year.[17]

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10. On the relationship between current Rule 4(j) and proposed Rule 4(m), see the Advisory Committee Note for the latter. 111 S. Ct. (No. 16) at CCCXIII.

11. There was more confusion of the same sort. For example, in the order in which it transmitted the spurious language of Rule 15(c)(3) to Congress, the Court also abrogated Form 18A and replaced it with Forms 1A and 1B. In so doing, the Court adopted the recommendations of the Judicial Conference. Those recommendations, however, were intended (in the words of the Advisory Committee) to "reflect the revision of Rule 4." 111 S. Ct. (No. 16) at CCCXCIII.

12. *See supra* note 8.

13. Congress periodically jettisons all or part of a rule transmitted by the Supreme Court. For example, Congress did so when it enacted The Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, 96 Stat. 2527 (Jan. 12, 1983). This statute amends Rule 4 and is discussed in G. SHREVE & P. RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE 91-94 (1989).

14. *See supra* note 2.

15. *See* R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 231-32 (1975); 3 R. POUND, JURISPRUDENCE 490-91 (1959); 2A D. SANDS, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION 413 (1973). The Supreme Court has long recognized the maxim. *E.g.*, Holy Trinity Church v. United States, 143 U.S. 457 (1892). The Court recently invoked it to break the constraint of express language in Rule 609(a)(1) of the Federal Rules of Evidence. Green v. Bock Laundry Mach. Co., 109 S. Ct. 1981, 1984-85 (1989). Even Justice Scalia, the most outspoken proponent of fidelity to the plain language of statutes, *see* Eskridge, *The New Textualism*, 37 UCLA L. REV. 621, 624 (1990), rejected the clear text of Rule 609(a)(1) because "if interpreted literally" it "produces an absurd, and perhaps unconstitutional, result." *Green*, 109 S. Ct. at 1994 (Scalia, J., concurring).

16. A case involving phantom Rule 4(m) would present the Supreme Court with a situation much more embarrassing than the one it encountered in *Green*, 109 S. Ct. 1981. *See supra* note 15. The Court bore no responsibility for the language it pronounced absurd in *Green*, since that language had been injected into the rule by Congress. *Id.* at 1988-90.

17. Until then, it is doubtful whether a means exists under the Rules Enabling Act for the Supreme Court to transmit a correction to Congress. *See supra* note 2. Re-enactment of the process next year suggests the possibility of a solution on December 1, 1992.

That is the story of phantom Rule 4(m). What does one make of the story? The discussions I have had with other proceduralists suggest that answers vary. It is not yet clear whether my point of view (or any other) reflects a consensus. I doubt that all commentators would be as sharp in their criticism of the Supreme Court as I will be over the balance of this essay or that all would be as concerned over the probable lack of a strong reaction against Rule 4(m) as I will be or that all would be as inclined to see a connection between the lack of a response and general trends in modern legal scholarship.

One Reaction to Phantom Rule 4(m)

The Court's error might foster some instability in relation-back cases. But there is reason to hope that, even if Congress permits phantom Rule 4(m) to become law, the immediate damage to federal procedure will not be great. Since the Supreme Court can patch up Rule 15(c)(3) through interpretation,[18] lower federal courts should be able to do so as well. Yet the Court's error has caused damage of a different sort which, although hard to measure, is serious and more difficult to repair. The Court's inattention to the content of its own recommendations to Congress is quite disturbing. Even the nation's most distinguished legal institution is entitled to make mistakes, but not stupid mistakes. Phantom Rule 4(m) may make it harder for some to take the United States Supreme Court seriously, or to take civil procedure seriously, or both. That Congress occasionally makes such errors[19] is beside the point. We do not expect of Congress the same high levels of concentration and of commitment to coherent lawmaking that we do of the Supreme Court.[20]

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18. *See supra* note 15 and accompanying text.

19. Changes in federal removal law attempted in The Judicial Improvements Act of 1988 provide an example. Congress meant in amending 28 U.S.C. § 1446 to substitute for "petition" the phrase "notice of removal." But it was less than thorough and amended § 1446 continues in several places to refer to the term "petition." *See* Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvements Acts of 1988 and 1990,* 24 U.C. Davis L. Rev. 735, 751 n.50 (1991). In the same amendment to § 1446, Congress abolished the bond requirement for removal. Yet § 1446(d) refers (now inexplicably) to events which follow "the filing of" a "bond." *See* L. Teply & R. Whitten, Civil Procedure 127 n.243 (1991).

20. It has long been understood that inherent features prevent Congress from focusing as well on these objectives. *See, e.g.,* E. Levi, An Introduction to Legal Reasoning 33-40 (1948). Congress' institutional frailties have recently been explored by many commentators. *E.g.,* Brennan & Buchanan, *Is Public Choice Immoral? The Case for the "Nobel" Lie,* 74 Va. L. Rev. 179 (1988); Eskridge, *Dynamic Statutory Interpretation,* 135 U. Pa. L. Rev. 1479 (1987); Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model,* 86 Colum. L. Rev. 223 (1986); Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980's,* 139 U. Pa. L. Rev. 1 (1990).

Whether there will be much printed response to the episode is another matter. Developments in procedural law are seldom of great interest to the news media,[21] and the phantom Rule 4(m) is more likely to capture the attention of legal scholars than the general public. Yet it is uncertain how extensive responses will be even from the former.

Academics are seldom bashful about criticizing the Supreme Court. We stripmine the Justices' opinions and devote innumerable pages in law journals to interpreting and second-guessing the Court's work. But this is different. Phantom Rule 4(m) represents such a whopping error that it seems almost indelicate to talk about it. The episode may therefore provide little grist even for current debates about the institutional role and personality of the Court. There may not, for example, be many attempts to exploit Court fumbling in Rule 15(c)(3) as proof that the role designed for the Court in procedural rule making is inappropriate,[22] or as proof that the Court has become so politicized,[23] or so debilitated by personal wrangling[24] that it is no longer capable of attending to important details of judicial administration.

Can we simply fault the Court for a major lapse of judicial craftsmanship and leave it at that? Models of professionalism are certainly available to test the Court's performance.[25] Yet, because we labor under the conditions of modern legal scholarship, firm footing may be harder to find. Appeals

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21. *Cf.* Younger, *What Happened in* Erie, 56 TEX. L. REV. 1011, 1029 (1978) (noting the initial failure of the press to report the Supreme Court's decision in the landmark civil procedure case, Erie R.R. v. Tompkins, 304 U.S. 64 (1938)).

22. This possibility has been explored from different angles. *See, e.g.*, M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL REVIEW 20-22 (2d ed. 1990); J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 96-104 (1977); Clinton, *Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts,* 63 IOWA L. REV. 15 (1977); Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis,* 27 STAN. L. REV. 673, 675-77 (1975); Lewis, *supra* note 7.

Even if the role assigned to the Supreme Court under the current scheme is appropriate, this episode calls into question the Court's practice of transmitting its amendments to Congress without circulating them for comment.

23. The possibility that the Court's work has suffered from preoccupation with political concerns is examined at some length in Shreve, *Symmetries of Access in Civil Rights Litigation: Politics, Pragmatism and* Will, 66 IND. L.J. 1 (1990). For additional perspectives, see A. COX, THE COURT AND THE CONSTITUTION 370-71 (1987); J. ELY, DEMOCRACY AND DISTRUST 54-60 (1980); Greenawalt, *The Enduring Significance of Neutral Principles,* 78 COLUM. L. REV. 982 (1978); and Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values,"* 60 CORNELL L. REV. 1 (1974).

24. *See* Quick, *Whatever Happened to Respectful Dissent?,* A.B.A. J., June, 1991, at 62. *Cf.* Revesz & Karlan, *Nonmajority Rules and the Supreme Court,* 136 U. PA. L. REV. 1067, 1067 (1988) (discussing the increased polarization of the voting patterns of the justices and the increase in separate dissents).

25. *E.g.*, R. KEETON, JUDGING (1990); Golding, *Principled Decision-Making and the Supreme Court,* 63 COLUM. L. REV. 35 (1963); Greenawalt, *supra* note 23; Shapiro, *In Defense of Judicial Candor,* 100 HARV. L. REV. 731 (1987).

to craft face growing skepticism.[26] Moreover, because consensus within the legal academy about what the law is or ought to be has diminished,[27] it is difficult to attack even something as grotesque as phantom Rule 4(m) with force and particularity. It is worth considering some aspects of the problem in more detail.

First, law's fragmentation is a byproduct of the most important development in modern legal scholarship: the shift from insularity to inquiry informed by other disciplines. The benefits from this development[28] probably far outweigh the costs, but the costs are sobering. The interdisciplinary pull of modern legal scholarship may place some law professors in closer touch with colleagues in other university departments; however, it may also estrange them from the environment inhabited by clients, lawyers, and judges, the world they are supposed to be preparing many of their students to enter. More to the point here, the interdisciplinary shift has created for many scholars a dismembered, apologetic image of the law.[29]

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26. "Invocations of craft are often little more than lyrical descriptions of a sense of professionalism, which do not specify genuine limits." Wolfe, *Grand Theories and Ambiguous Republican Critique: Tushnet on Constitutional Law,* 15 LAW & SOC. INQUIRY 831, 834 n.1 (1990). *Cf.* Luban, *Legal Traditionalism,* 43 STAN. L. REV. 1035, 1057 (1991) ("[T]raditionalism always arrives on the scene too late. It is the political counterpart of what individuals experience as nostalgia for lost innocence.").

27. *See, e.g.,* Stone, *From a Language Perspective,* 90 YALE L.J. 1149, 1156 (1981) ("Asking 'what is law?' has fallen, I fear, out of fashion.").

28. Civil procedure scholarship offers an example. I complained in 1980 that

> thinking about . . . rules of procedure . . . has dwelt too much in the middle latitudes of appellate judicial doctrine. . . . The inquiry should be broadened by probing the jurisprudential values that appellate judges infrequently—perhaps almost never—explore . . . , and by probing the particular stress and flavor of . . . controversies that comprise a vital part of the trial court process, which are often beyond the accessibility of appellate judges.

Shreve, *Questioning Intervention of Right—Toward a New Methodology of Decisionmaking,* 74 NW. U.L. REV. 894, 894-95 (1980).

Now the picture is brighter. Procedural jurisprudence has attracted a growing number of talented scholars who have enriched the topic from a variety of interdisciplinary perspectives. *E.g.,* Bandes, *The Idea of a Case,* 42 STAN. L. REV. 227 (1990); Mullenix, *God, Metaprocedure, and Metarealism at Yale,* 87 MICH. L. REV. 1139 (1989); Perdue, *Personal Jurisdiction and the Beetle in the Box,* 32 B.C.L. REV. 529 (1991); Toran, *'Tis a Gift to Be Simple: Aesthetics and Procedural Reform,* 89 MICH. L. REV. 352 (1990). Similarly, more scholars have borrowed from social science disciplines to test assumptions about trial litigation that underpin procedural law. *E.g.,* H. KRITZER, THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION (1990); E. LIND & T. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988); *Empirical Studies of Civil Procedure,* (pts. 1 & 2), 51 LAW & CONTEMP. PROBS. 1, Summer 1988, 51 LAW & CONTEMP. PROBS. 1, Autumn 1988; Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact,* 137 U. PA. L. REV. 2197 (1989); Trubeck, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation,* 31 UCLA L. REV. 72 (1983).

29. Professor Christopher Stone wrote of those entering the law-teaching profession:

> The brightest of the candidates, though typically "willing to 'do' torts," have as their principal interest some body of scholarship outside the law. They have discovered in, say, economics or social-choice theory, some lance of insight with which they are prepared to take a tilt at the law—any body of legal rules should do—in some way it has not been tilted at before.

For example, techniques of deconstruction borrowed from philosophy and literary criticism have produced some penetrating results in legal scholarship.[30] Yet, because deconstructionism interprets texts in a way ignoring context, logic, norms, or drafters' intent, it could undermine the view that it is nonsensical for Rule 15(c)(3) to refer to Rule 4(m). Deconstructionists might maintain that such a reference is as useful as a reference to Rule 4(j) would have been. Their approach suggests that neither "4(m)" nor "4(j)" has extrinsic meaning[31] and that the terms are equally suited as receptacles for whatever meaning the community reading Rule 15(c)(3) might choose to give them.[32]

The second reason why contemporary legal scholarship fails to support a firmer response to phantom Rule 4(m) is somewhat related to the first. Convictions that the law does or should have particular content may be severely tested by growing doubt that our society (or perhaps any society) can function successfully. The greater tendency of commentators to emphasize conflict, oppression, or uncertainty when discussing legal topics seems part of a drift toward disillusionment in legal scholarship[33] and in other

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Stone, *supra* note 27, at 1151. *See* Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987,* 100 HARV. L. REV. 761, 766 (1987) ("The supports for the faith in law's autonomy as a discipline have been kicked away in the last quarter century.").

Others disagree, of course, and claim freestanding vitality for law. *E.g.,* Fried, *The Artificial Reason of the Law or: What Lawyers Know,* 60 TEX. L. REV. 35 (1981). *Cf.* Fiss, *The Law Regained,* 74 CORNELL L. REV. 245, 249 (1989) ("I continue to believe that law is a distinct form of human activity . . . ."). Yet because the idea (so accepted a generation or two ago) of law as autonomous discipline is under attack, more precise efforts to determine what aspects of the law are, or ought to be, suffer accordingly.

30. *E.g.,* Balkin, *Deconstructive Practice and Legal Theory,* 96 YALE L.J. 743 (1987) (attributing essential features of deconstructionism to the writing of French philosopher Jacques Derrida); Dalton, *An Essay in the Deconstruction of Contract Doctrine,* 94 YALE L.J. 997 (1985); Fish, *Working on the Chain Gang: Interpretation in Law and Literature,* 60 TEX. L. REV. 551 (1982).

31. *See* S. FISH, IS THERE A TEXT IN THIS CLASS? 14 (1980); Fish, *supra* note 30, at 551-52.

32. Whether this reading of deconstructionism is entirely right is probably a matter of controversy. As I noted earlier, deconstruction does appear "to invite the assumption that conflict between interpretive communities for the dominant (hence real) meaning of a text goes on without reference to notions of value or higher social good. Might makes right; or, at least, might makes meaning." Shreve, *supra* note 23, at 14 n.75. For similar reactions, see A. ALTMAN, CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE 19 (1990); Cornell, *Two Lectures on the Normative Dimensions of Community in the Law,* 54 TENN. L. REV. 327, 328-29 (1987); and Fiss, *Objectivity and Interpretation,* 34 STAN. L. REV. 739 (1982). Professor Balkin recently acknowledged "the popular conception of deconstruction as linguistic nihilism coupled with assertions of complete individual freedom in the reading of texts." Balkin, *Ideology as Constraint,* 43 STAN. L. REV. 1133, 1136 n.19 (1991). Balkin questions the accuracy of this conception. *Id.*

33. It is, of course, only natural that groups long victimized by injustice and only recently permitted a voice in legal discourse would be more critical of the legal order. *See, e.g.,* the feminist literature noted in Teachout, *Chicago Exposition: The New American Jurisprudential Writing as a Cultural Literature,* 39 MERCER L. REV. 767, 847 n.270 (1988); and in Robel, Book Review, 8 CONST. COMMENTARY 309, 312 n.5 (1991) (reviewing KARST, BELONGING TO AMERICA (1989)).

disciplines. Aspects of this phenomenon are sometimes called postmodernism.[34] Postmodernism diminishes opportunities for wide agreement about what is (or would be) good in the law. From a postmodernist perspective, phantom Rule 4(m) may be no more nonsensical than law often is.[35]

A third set of difficulties awaits those tempted to confront the Court over Rule 4(m). Increasingly, civil procedure literature stresses procedure's impact on particular sets of rights[36] or on particular groups.[37] But, in visualizing the consequences of this error, it is not easy to identify rights or groups that will suffer especially. The affront instead seems to be to broader principles of judicial administration—principles that are trans-substantive.[38] Because so much contemporary scholarship has disparaged trans-substantive approaches to identifying the function and value of civil procedure,[39] it becomes more difficult to arouse concern over phantom Rule 4(m).

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34. "Postmodernism questions the integrity, the coherence, and the actual identity of the humanist individual self—the knowing sort of self produced by Enlightenment epistemology and featured so often as the dominant self-image of the professional academic." Schlag, *Normative and Nowhere to Go,* 43 STAN. L. REV. 167, 173 (1990). For additional descriptions of postmodernism, see R. BERNSTEIN, PHILOSOPHICAL PROFILES 58-61 (1986); C. WEST, THE AMERICAN EVASION OF PHILOSOPHY 235-39 (1989); I. YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 124-30 (1990).

35. "What characterizes so much of what is sometimes called post-modernity is a new playful spirit of negativity, deconstruction, suspicion, unmasking. Satire, ridicule, jokes and punning become the rhetorical devices for undermining 'puritanical seriousness.'" Bernstein, *supra* note 34, at 59.

36. *E.g.,* Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights,* 137 U. PA. L. REV. 2179 (1989); Garth, *Privatization and the New Formalism: Making the Courts Safe for Bureaucracy,* 13 LAW & SOC. INQUIRY 157 (1988); Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure,* 86 COLUM. L. REV. 433 (1986); Nelken, *Sanctions Under Amended Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment,* 74 GEO. L.J. 1313 (1986); Tobias, *Rule 11 Recalibrated in Civil Rights Cases,* 36 VILL. L. REV. 105 (1991).

37. For example, influences of feminist jurisprudence have begun to appear in civil procedure writing. *See* Minow, *Some Thoughts on Dispute Resolution and Civil Procedure,* 34 J. LEGAL EDUC. 284 (1984); Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts,* 24 GA. L. REV. 909 (1990); Schneider, *Rethinking the Teaching of Civil Procedure,* 37 J. LEGAL EDUC. 41 (1987). The pace of the trend will likely increase after the program of the Civil Procedure Section of the Association of American Law Schools, entitled "Feminist Procedure," is presented at the Association's annual meeting in January, 1992.

38. *See* Shreve, *Pragmatism Without Politics—A Half Measure of Authority for Jurisdictional Common Law,* 1991 B.Y.U.L. REV. 767, 786-96. Others have invoked the concept of trans-substantive procedure without emphasizing to the same extent its ties to judicial administration. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-trans-substantive Rules of Civil Procedure,* 137 U. PA. L. REV. 2067, 2067-68 (1989); Hazard, *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure,* 137 U. PA. L. REV. 2237 (1989); Matheson, *Procedure in Public Person Defamation Cases: The Impact of the First Amendment,* 66 TEX. L. REV. 215, 224-25 (1987); Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy,* 72 MINN. L. REV. 627, 633 (1988).

39. A partial list would include O. FISS, THE CIVIL RIGHTS INJUNCTION (1978); Burbank,

Readers hardly need to be reminded that this essay has been riding for some time on a tide of opinion and speculation. It is a matter of opinion whether phantom Rule 4(m) is really cause for such distress. Even if it is, and even if a sharp scholarly reaction against it is not forthcoming, it is speculative to suggest that a more forceful response to the same error would have occurred, say, twenty-five years ago—before the emergence of unsettling forces like deconstruction and post-modernism and before the relative decline of trans-substantive procedural values.

If there are those who found these opinions and speculations less than helpful, I would urge them to go back to the opening portion of this essay and make of the fascinating story of phantom Rule 4(m) what they will. What I finally make of it is this. First, this sad episode may be proof of the need to search for more resonant images of law and judicial behavior. Few would return to the insular, self-satisfied age of legal scholarship. Still, we must not lose sight of law's own pragmatism, of the extent that law *as a discipline* must define and serve law's own needs.[40] Second, to assume (as we must) that procedure should exist only to make real the values of substantive law does not mean that procedural problems are important *only* when their effects can be isolated within a particular category of substantive interests. The debacle of Rule 4(m) reminds us that trans-substantive concerns can be important as well.

Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law, 63 NOTRE DAME L. REV. 693 (1988); Burbank, *The Costs of Complexity,* 85 MICH. L. REV. 1463 (1987); Chayes, *The Role of the Judge in Public Law Litigation,* 89 HARV. L. REV. 1281 (1976); Galanter, *Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change,* 9 LAW & SOC'Y REV. 95 (1974); Tobias, *Federal Law Litigation and the Federal Rules of Civil Procedure,* 74 CORNELL L. REV. 270 (1989). *See also* the authorities cited in Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking,* 137 U. PA. L. REV. 1969, 1976 n.21 (1989).

40. Here the Supreme Court may be a step ahead of some legal scholars. Professor Frederick Schauer raises this possibility in the setting of statutory interpretation.

> The Justices have not been reading their Derrida. Indeed, despite the lengthy importunings of legions of law professors, the Justices have been neglecting to read not only Derrida, but Foucault, Gadamer, Rorty, and Heidegger as well. Instead, as the statutory construction cases of the 1989 Term demonstrate, they have been spending their time reading (Noah) Webster, relying, both in fact and in articulated justification, on notions of plain meaning routinely derided in contemporary legal scholarship.

Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning,* 1990 SUP. CT. REV. 231, 231.